

March 12, 2013

Blaine F. Bates
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE JOHN ANSON BERTOLA,
Debtor.

BAP No. CO-12-045

TAYA SWEEDEN,
Appellant,

Bankr. No. 11-29140
Chapter 7

v.

OPINION*

JOHN ANSON BERTOLA,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before KARLIN, SOMERS, and MOSIER¹, Bankruptcy Judges.

SOMERS, Bankruptcy Judge.

Chapter 7 Trustee Taya Sweeden (the “Trustee”) appeals the bankruptcy court’s order overruling her objection to the debtor claiming stock, purchased from proceeds of a sale of his residence, exempt under Colo. Rev. Stat. § 38-41-207. Because this case was filed less than two years after the sale of the homestead, we agree with the bankruptcy court that stock which is traceable to money received from a sale of a debtor’s residence retains its character as

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

¹ Honorable R. Kimball Mosier, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

“proceeds” of the homestead for exemption purposes.

I. Factual Background²

In March 2010, John Bertola sold his home and received \$172,852.92 from the sale. Between April and May 2010, he deposited \$59,101.95 of the \$172,852.92 into a brokerage account, thereafter purchasing shares of two stocks with a cost-basis of \$58,725.80. Bertola initially purchased 1,000 shares of stock in Barnes & Noble, Inc. (“B&N”) and 20,000 shares of stock in E*Trade Financial Corp (“ETFC”). The 20,000 shares of stock in ETFC were subject to a reverse split of ten to one, resulting in Bertola owning 2,000 shares. Bertola later sold all shares of stock in B&N for \$19,515.67 and used most of those proceeds to purchase an additional 1,500 shares in ETFC.

Bertola filed a Chapter 7 petition on August 11, 2011. In his Schedule B, he listed 3,500 shares of stock with a value of \$37,310 (the “Stock”). In his Schedule C, he claimed the full value of the Stock as exempt pursuant to Colo. Rev. Stat. § 38-41-207. The Trustee objected, asserting that the money lost its “proceeds” status upon its conversion to stock and because Debtor failed to keep it separate from other funds.³ The bankruptcy court overruled the Trustee’s objection, concluding that under the facts of this case, conversion of homestead proceeds from cash to noncash property did not forfeit Bertola’s homestead exemption (the “Order”).⁴ The Trustee appealed.

² The facts are undisputed. Like the bankruptcy court, we incorporate by reference the Joint Statement of Facts submitted to it by the parties. Joint Statement of Facts Regarding Trustee’s Objection to Claims of Exemption, *in* Amended Appendix to Appellant’s Opening Brief (“App.”) at 54-79. For brevity’s sake, we repeat only those facts that we deem necessary for understanding of the case and disposition of the issues.

³ Trustee’s Objection to Claims of Exemption, *in* App. at 17-19.

⁴ Order, *in* App. at 93-98.

II. Appellate Jurisdiction and Standard of Review

This Court has jurisdiction over this appeal. The Trustee timely filed her notice of appeal from the bankruptcy court's final order and the parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Colorado.⁵

There are no disputed facts in this appeal. We review an order interpreting a state statute *de novo*.⁶ *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.⁷

III. Discussion

Bankruptcy courts look to applicable state law when determining the validity of a debtor's claim to a state law exemption.⁸ The Trustee, as the party objecting to the exemption, bears the burden of proof to show the impropriety of the exemption by a preponderance of the evidence.⁹ The right to claim the homestead exemption is determined as of the date of the bankruptcy petition.¹⁰

Colo. Rev. Stat. § 38-41-201 (the "Homestead Exemption Statute") provides in pertinent part:

(1) Every homestead in the state of Colorado shall be exempt from execution and attachment arising from any debt, contract, or civil obligation not exceeding in actual cash value in excess of any liens or encumbrances on the homesteaded property in existence at the time of any levy of execution thereon:

⁵ 28 U.S.C. § 158(b); Fed. R. Bankr. P. 8001(e); Fed. R. Bankr. P. 8002(a); *In re Duncan*, 294 B.R. 339, 341–342 (10th Cir. BAP 2003) (citing *In re Zibman*, 268 F.3d 298, 301 (5th Cir. 2001)) ("An order that grants or denies an exemption is a final order for purposes of appeal.").

⁶ *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

⁷ *Id.* at 238.

⁸ *In re Lampe*, 331 F.3d 750, 754 (10th Cir. 2003).

⁹ Fed. R. Bankr. P. 4003(c).

¹⁰ *In re Hall*, 441 B.R. 680, 685 (10th Cir. BAP 2009).

(a) The sum of sixty thousand dollars if the homestead is occupied as a home by an owner thereof or an owner's family[.]

Colo. Rev. Stat. § 38-41-207 (the "Proceeds Statute") provides:

The proceeds from the exempt amount under this part 2,¹¹ in the event the property is sold by the owner, or the proceeds from such sale under section 38-41-206 paid to the owner of the property or person entitled to the homestead shall be exempt from execution or attachment for a period of two years after such sale if the person entitled to such exemption keeps the exempted proceeds separate and apart from other moneys so that the same may be always identified. If the person receiving such proceeds uses said proceeds in the acquisition of other property for a home, there shall be carried over to the new property the same homestead exemption to which the owner was entitled on the property sold. Such homestead exemption shall not be valid as against one entitled to a vendor's lien or the holder of a purchase money mortgage against said new property.

In construing the Proceeds Statute, the bankruptcy court followed *In re Hoover*,¹² a 1984 bankruptcy court opinion, and defined "proceeds" as "[w]hatever is received by the Debtor when he sells his homestead property . . . [and] includes whatever is received when collateral or proceeds is sold, exchanged, collected, or otherwise disposed of."¹³ The *Hoover* court's definition was based upon the 1984 Article 9 Uniform Commercial Code ("UCC") definition of "proceeds" in Colo. Rev. Stat. § 4-9-306(1), which provided, in part, that "'proceeds' includes whatever is received upon the sale, exchange, collection, or other disposition of collateral proceeds."¹⁴ Applying that definition, the bankruptcy court concluded

¹¹ Part 2 refers to the \$60,000 exemption (or \$90,000 under facts not applicable here) specified in the Homestead Exemption Statute.

¹² *In re Hoover*, 35 B.R. 709 (Bankr. D. Colo 1984).

¹³ Order at 4, *in App.* at 96 (citing *Hoover*, 35 B.R. at 711).

¹⁴ The 1984 version of the statute, Colo. Rev. Stat. § 4-9-306(1) (1984), stated:

"Proceeds" includes whatever is received upon the sale, exchange, collection, or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security

(continued...)

that “conversion in this case of homestead proceeds from cash to noncash property did not forfeit Bertola’s homestead exemption.”¹⁵

The Trustee argues the bankruptcy court erred in two ways: (1) liberally construing “proceeds” to mean any asset that can be traced to a sale of a home, and (2) excluding the phrase “for a home” from its proceeds definition. We find both arguments unpersuasive.

1. The bankruptcy court correctly defined “proceeds.”

The Trustee claims the most consistent and best way to define “proceeds” is to limit it to whatever is received at the time of sale. She maintains that proceeds must be held in the same form and may not be converted into any other form in order to keep its exempt status. She argues the bankruptcy court erred in adopting the 1984 UCC definition of “proceeds” because the UCC no longer uses this definition.¹⁶ We reject this argument.

There is nothing in the Proceeds Statute to suggest that the definition of “proceeds” should change as the UCC is amended from time to time. The *Hoover* court adopted the 1984 UCC definition of “proceeds” simply because it could “discern no reason why this same broad and all-inclusive definition should not apply” to the Proceeds Statute.¹⁷ No Colorado court has questioned this construction. Further, the UCC amendment adopted after the *Hoover* decision both expanded its definition of “proceeds” and retained the concept that

¹⁴ (...continued)
agreement. Money, checks, deposit accounts, and the like are “cash proceeds.” All other proceeds are “noncash proceeds.”

¹⁵ Order at 6, *in App.* at 98.

¹⁶ The Trustee considers a check the equivalent to cash, thus converting a check into cash does not change the proceeds’ form. Likewise, depositing cash into a brokerage account does not change the proceeds’ form. Ironically, this comports with the 1984 UCC definition of “cash proceeds” as money, checks, deposit accounts, and the like.

¹⁷ *Hoover*, 35 B.R. at 711.

“proceeds” includes proceeds of proceeds.

The 1984 UCC definition of “proceeds” was repealed and recodified at Colo. Rev. Stat. § 4-9-102(a)(64). It now provides:

“Proceeds”, except as used in section 4-9-609(b), means the following property:

- (A) Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;
- (B) Whatever is collected on, or distributed on account of, collateral;
- (C) Rights arising out of collateral;
- (D) To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects, or infringement of rights in, or damage to, the collateral; or
- (E) To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

Comment 13 to that statute clarifies that: “The revised definition of ‘proceeds’ expands the definition beyond that contained in former Section 9-306 and resolves ambiguities in the former section.”¹⁸ Additionally, a secured party’s interest in proceeds of proceeds was retained through (1) the revised definition of “collateral” as including “proceeds to which a security interest attaches”¹⁹ and (2) the codification of the attachment of a security interest, determined through tracing, in identifiable proceeds.²⁰ Therefore, if the bankruptcy court had relied on the current version of the UCC for the definition of “proceeds,” it would have reached the same result.

Like the bankruptcy court, we find nothing in the Proceeds Statute that

¹⁸ Colo. Rev. Stat. § 4-9-102(a)(64) cmt. 13.

¹⁹ Colo. Rev. Stat. § 4-9-102(12)(A).

²⁰ Colo. Rev. Stat. § 4-9-315(a)(2) and (b). *See also id.* cmt 3 (“Under subsection (a)(2), which derives from former Section 9-306(2), a security interest attaches to any identifiable ‘proceeds,’ as defined in Section 9-102. . . . Subsection (b) [] indicates when proceeds commingled with other property are identifiable proceeds and permits the use of whatever methods of tracing other law permits with respect to the type of property involved.”).

supports limiting “proceeds” to whatever is received at the time of sale. Nor is there anything in the Proceeds Statute that prohibits the debtor from converting proceeds into a different form during the two-year period. The first sentence of the Proceeds Statute gives exempt status to proceeds from the sale of a homestead property for two years if it is kept separate and apart from other money so that it may be always identified. Under its plain language, the Proceeds Statute’s only requirement to retain exempt status during the two-year period is the proceeds’ traceability. As long as the proceeds are kept separate and identifiable, they remain exempt during the two-year period. Indeed, requiring traceability suggests that a debtor may convert the proceeds into another form.

The second sentence of the Proceeds Statute extends exempt status to the new property if, within two years of the sale of the previous homestead, the debtor uses the proceeds in the acquisition of other property for a home. By negative implication, if the debtor does not acquire other property for a home at the end of the two years, the exemption ceases to apply to the proceeds.

Debtor sold his home on March 3, 2010. He filed his Chapter 7 petition on August 11, 2011, approximately one year and five months later.²¹ Because Debtor claimed the exemption within the two-year period, the Proceeds are exempt as long as they are kept separate and identifiable. The bankruptcy court held that Bertola complied with the Proceeds Statute’s requirements for separation and identifiability.²² Because the Trustee neither briefed nor argued Bertola failed to keep the sale proceeds separate and identifiable, she has waived this issue on appeal.²³

²¹ *In re Hall*, 441 B.R. 680, 685 (10th Cir. BAP 2009) (“The right to claim the homestead exemption is determined as of the date of the bankruptcy petition.”).

²² Order at 5, *in App.* at 97.

²³ *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1231 (10th Cir. 1990)
(continued...)

The Trustee argues that focusing on the traceability of an asset back to a homestead sale rather than the type of asset undermines the purpose of the Proceeds Statute and could lead to an absurd result if the stock appreciated to an aggregate value exceeding Colorado's homestead exemption limit.²⁴ Neither argument persuades this Court to reverse the bankruptcy court. First, the purpose of the Colorado homestead exemption is to secure the debtor owning his residence, to preserve the home for the family, to avoid destitution, to secure the permanent habitation of the family, and to cultivate the interest, pride, and affection of the individual.²⁵ Focusing on the type of asset would limit a debtor's options. We agree with the bankruptcy court that "[t]he Proceeds Statute affords a debtor a period of time to choose what to do with homestead proceeds to further advance this purpose."²⁶ Second, the Trustee's stock appreciation argument is just a hypothetical; those facts did not occur here, and she did not raise the argument below. Thus, she failed to preserve that issue for appeal.²⁷

2. The "for a home" criteria in the second sentence of the Proceeds Statute determines the length of the exemption, not exempt status.

Finally, the Trustee argues the bankruptcy court's definition of "proceeds" robs the second sentence of the Proceeds Statute of any meaning because it

²³ (...continued)
(issue not argued in an appellate brief is waived); *Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995) (if issue is not briefed and argued, it is waived).

²⁴ Appellant's Brief at 10-11.

²⁵ *Fleet v. Zwick*, 994 P.2d 480, 482 (Colo. App. 1999); *In re Dodge*, 685 P.2d 260, 2 (Colo. App. 1984).

²⁶ Order at 6, *in App.* at 98.

²⁷ *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (appellate court generally will not consider issues that were not raised below).

excludes the phrase “for a home” out of that sentence.²⁸ She contends the purpose of the second sentence of the Proceeds Statute is to specify how proceeds may be used if they are to remain exempt. Because the Colorado legislature specified that proceeds used to acquire other property for a home remain exempt, she argues the converse must be true: “proceeds used in the acquisition of other property **not** for a home are **not** exempt.”²⁹ Thus, according to the Trustee, for proceeds to remain exempt a debtor may only change the form of the proceeds to acquire other property for a home. We disagree.

The second sentence of the Proceeds Statute does not say proceeds must be exclusively used to acquire other property for a home to retain exempt status. Rather, it grants a carryover homestead exemption if the proceeds are used to acquire other property for a home within two years of the sale of the previous property. So, if proceeds are used to acquire other property for a home, then the homestead exemption continues beyond the two-year period. If, however, the proceeds are not used to acquire other property for a home (i.e., if the proceeds remained in the brokerage account), then the homestead exemption ceases to apply to the proceeds at the end of two years. Using the proceeds to acquire “other property for a home” extends exempt status beyond two years. Not using the proceeds to acquire a new homestead means the proceeds’ exempt status is limited to two years. If “proceeds” was intended to be as narrowly defined as the Trustee suggests, then the time limitation and the separate and identifiable requirement are rendered superfluous.

IV. Conclusion

The bankruptcy court’s definition of proceeds is consistent with the plain language of the Proceeds Statute and the purpose of the Homestead Exemption

²⁸ Appellant’s Brief at 8.

²⁹ *Id.* at 9.

Statute. Under the facts of this case, converting homestead proceeds from cash to noncash property did not forfeit the debtor's homestead exemption. Accordingly, we AFFIRM the Order.